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No. 89-489.

In the
Supreme Court of the United States.

OCTOBER TERM, 1989.

WILLIAM B. SMITH,
PETITIONER,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY AND
LINCOLN LABORATORY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT.

Brief in Opposition to Petition for Writ of Certiorari.

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October 20, 1989

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COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Whether the First Circuit Court of Appeals correctly held that Petitioner's counsel, by his voluntary absence during the jury deliberations, waived whatever objection Petitioner may have had to supplemental jury instructions given in his absence.

2. Whether the First Circuit Court of Appeals correctly held that the jury instructions to which Petitioner objected for the first time on appeal did not rise to the level of plain error.

3. Whether the fact that the First Circuit Court of Appeals did not cite this Court's decision in *Price Waterhouse* as a basis for its conclusion that the jury instructions reviewed as a whole were not error, requires a remand of this case.

RULE 28.1 LISTING.

Lincoln Laboratory is part of the Massachusetts Institute of Technology. Massachusetts Institute of Technology has no parent companies, subsidiaries, or affiliates to list pursuant to Sup. Ct. R. 28.1.

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The Respondent, Massachusetts Institute of Technology ("MIT") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the First Circuit's decision in this case. That decision is reported at 877 F.2d 1106 (1st Cir. 1989) and is reproduced as an Appendix to the Petition for Certiorari ("Petition"), at A-1 through A-13.

Counterstatement of the Case.

After sixteen days of trial and final instructions to the jury in this age discrimination case, Petitioner William B. Smith's ("Petitioner") counsel left for vacation and was absent during the jury deliberations. In the course of these deliberations, the jury asked a series of questions to which the trial court responded. Petitioner's counsel, having chosen to be absent, made no objection to the trial court's open court response to the jury's question. On appeal to the First Circuit, Petitioner for the first time complained that the trial court's response was confusing to the jury. The First Circuit held that Petitioner's counsel had a duty under Rule 51 of the Federal Rules of Civil Procedure to inform the trial court of his objection at the time the instructions were given and that his voluntary absence constituted a waiver of any objection he may have had. In addition, the First Circuit held that the instructions as given were not plain error.

Petitioner sued MIT's Lincoln Laboratory ("the Laboratory") for age discrimination as a result of his termination from the Laboratory in 1978 when he was 47 years old. At the close of the evidence, the court instructed the jury on the appropriate method of proof of discrimination in a circumstantial evidence case in accordance with *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). (App. Vol. II at 199-210). After giving these instructions the court called counsel to side bar and asked if there were any objections. Petitioner's attorney requested one correction, which the court agreed to make; he then stated "That's the only objection I have your honor". (App. Vol. II at 210). After the jury charge, Petitioner's counsel informed the court that he would be out of the state during the next week. (Transcript at 16-38 to 16-39). He did not make any arrangements for coverage by another attorney in his absence nor did he request any provision to allow him to respond to questions from the jury. (Transcript at 16-38 to 16-39).

Shortly after beginning its deliberations, the jury requested the instructions in writing. The court declined to provide written instructions, but did repeat the instructions on the method of proof. (App. Vol. II at 215 to 219). During this reinstruction, the court, without objection from Petitioner's now absent counsel, expanded the instruction to state that if Petitioner proved by direct evidence that discrimination was a motivating factor in his termination, then Respondent MIT had the burden of proving it would have terminated Petitioner absent the discrimination. (App. Vol. II at 219).

On its second full day of deliberations, the jury asked another question. (Transcript at 18-2). In a bench conference, noting that Petitioner's counsel was absent, the court said, "I have called counsel, and counsel representing plaintiff is unavailable. But my understanding is that he chooses not to be here, and again, I must continue without his presence. That's a fair statement." (Transcript at 18-2). The court went on to respond to the jury's question, and in its response included the direct evidence instruction it had previously given placing the burden of proof on Respondent MIT. (Transcript at 18-10).

On the next day of deliberations, the jury asked another question. Before addressing the substantive issue of the particular question, and while the jury was out of the courtroom, the court stated:

> I have a call — I have a communication from the jury. And I have notified your office and I have notified the other office but counsel for plaintiff is not available.
>
> And as I understood it, he was generally unavailable from the time deliberations started till [*sic*] now. And he indicated I believe that he was, you know, that the Court could carry on its business with or without his presence. He made no assignment of

> someone else to cover the jury deliberations process and the taking of the verdict. And so I have just concluded that consistent with his own intentions is that he is voluntarily absent from this period of time. And there was no request for any continuance or delay in the jury deliberations. And so I'm just assuming that he concedes his right to be here and that it does not proscribe my authority to continue to tell the jurors to come to a verdict and to take the verdict in his absence.

(Transcript at 19-2). The court then went on to deal with a question by a juror about the course of deliberations. (Transcript at 19-6 to 19-19).

On the last day of its deliberations, the jury asked a question and was reinstructed on the method of proof of a discrimination case. The court included the instruction that, after proof of discrimination by direct evidence, the burden of proof shifts to the employer to show that the same action would have been taken absent the discrimination. (App. Vol. II. at 224 to 225). The jury returned a verdict for MIT and Petitioner appealed.

The First Circuit Court of Appeals ruled, *inter alia,* that counsel's failure to be present when supplementary jury instructions were given constitutes a waiver of objections he may have had to those instructions. *Smith* v. *Massachusetts Institute of Technology*, 877 F.2d 1106, 1110 (1st Cir. 1989), Petition at A-6. The court further held that the Rule 51 duty to inform the trial court of any objection to the instructions as given to the jury was not discharged by Petitioner's counsel's statements to the trial court over the telephone prior to the actual instruction. *Id.* Finally, the First Circuit, after reviewing the instructions as a whole, held that the error assigned by Smith to the instructions in question did not rise to the level of plain error. *Id.*

Reasons for Denying the Writ.

This case presents no reason, compelling or otherwise, to grant the Petition for Writ of Certiorari. The First Circuit correctly held that Petitioner, by his voluntary absence throughout the period of jury deliberation, waived his after-the-verdict objection to supplementary instructions given in his absence. There is no split in the circuits concerning the application of Rule 51 of the Federal Rules of Civil Procedure to the facts of this case. Further, the First Circuit correctly found that the jury instructions, when read as a whole, did not rise to the level of plain error required to overcome the strictures of Rule 51. Finally, the mere fact that the First Circuit did not cite this Court's opinion in *Price Waterhouse* v. *Hopkins*, 490 U.S. , 109 S.Ct. 1775, 104 L.Ed.2d 268 (May 1, 1989), brought to the attention of the court by both Petitioner and Respondent, does not mean that the First Circuit failed to consider it in determining that the jury instructions did not constitute plain error.

I. There Is No Conflict Between the Circuits Presented by the Facts of This Case Where Petitioner's Counsel Waived His Objections to Supplementary Instructions Through His Voluntary Absence During Jury Deliberations.

Petitioner asks this Court to exercise its discretion and review this case on the ground of an alleged conflict between the circuits on the application of Rule 51 of the Federal Rules of Civil Procedure. Rule 51 requires that objections to jury instructions be made after the jury has been charged and before it retires to deliberate. Petitioner asserts that in a majority of circuits, counsel's expression of his views to the trial court over the

telephone, an expression not found anywhere in the record, would preserve his views of the applicable law for review on appeal. He presses this assertion even though the telephone call was made before, not after, the jury was charged. (Petition at 11). Neither logic nor the case law cited by Petitioner supports this assertion.

As a matter of logic, had Petitioner's counsel been present when the court supplemented its instructions to the jury, he would have had to make a record objection in order to preserve for appellate review the issue of the correctness of the supplemental instructions. Petitioner here should have no greater rights because his counsel chose not to be present to listen and object to the court's responsive instructions to the jury. There is no conflict between the circuits on the facts presented by this case. Petitioner's counsel's voluntary absence during the jury deliberations constitutes a waiver of any objection he might have had to supplemental jury instructions.

The facts presented by Petitioner exemplify the circumstance that Rule 51 was designed to avoid — that of a lawyer who is voluntarily absent during crucial jury instructions and later seeks to challenge those instructions as erroneous. The courts that have addressed this issue have found that counsel's absence during jury deliberations constitutes a waiver of his right to be there and to any objections he might have had. *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383, 390 (1888) ("The absence of counsel, while the court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasions may require, nor dispense with the necessity of reasonably excepting to his rulings and instructions nor give jurisdiction to a court of error to decide questions not appearing of record."); *see also McKnelly* v. *Sperry Corp.*, 642 F.2d 1101, 1108 (8th Cir. 1981); *Macartney* v. *Compagnie Generale Transatlantique*,

253 F.2d 529, 535 (9th Cir. 1958); *Arrington* v. *Robertson*, 114 F.2d 821, 823 (3d Cir. 1940); *Skill* v. *Martinez*, 91 F.R.D. 498, 504-506 (D.N.J. 1981), *aff'd*, 677 F.2d 368 (3d Cir. 1982); *Hartol Petroleum Corp.* v. *Cantelou Oil Co.*, 107 F.Supp. 373, 377 (W.D.Pa. 1952).

In this case, the district court instructed the jury in open court after first finding that Petitioner's counsel had voluntarily chosen not to be there. (Transcript at 19-2). The First Circuit followed established case law when it ruled in the instant case that "[i]f supplementary instructions become necessary and counsel is not present, this constitutes a waiver of any objection to the supplemental instruction." 877 F.2d at 1109, Petition at A-6.

Petitioner's complaint here is that the trial court's instruction was confusing in that it contained elements of what Petitioner's counsel had requested and elements which he now claims favored the Respondent MIT. Petitioner is not complaining that the trial court rejected his view of the law, but rather of how the court articulated it. This is precisely the kind of case for which Rule 51 exists, since it is impossible for a party to know whether it has an objection to the court's articulation of the law until after that articulation is made. In effect, Petitioner asks this Court to engraft a "Monday morning quarterback" exception to Rule 51. Rule 51's main message, however, is "Speak now, or forever hold your peace." While it is true that an on the record objection, specifically made and specifically rejected, need not be ceremoniously repeated, the record must be clear that the objection was in fact made and rejected. *Estate of Larkins* v. *Farrell Lines, Inc.*, 806 F.2d 510, 515 (4th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987) (unrecorded objection during five and one-half hour conference afforded no basis for appellate review); *Whiting* v. *Jackson State University*, 616 F.2d 116, 126-127 (5th Cir. 1980) ("Even if an objection was made, it does not appear in the record on appeal; we

cannot review it"); *Eulo* v. *Deval Aerodynamics, Inc.*, 430 F.2d 325 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Hardware Mutual Insurance Company* v. *Lukken*, 372 F.2d 8, 13 (10th Cir. 1967).

The cases from other circuits cited by Petitioner involved circumstances in which there was a clear record of the party's objection regardless of whether it was made before or after the jury charge. *See Perkinson* v. *Gilbert/Robinson, Inc.*, 821 F.2d 686, 693 (D.C. Cir. 1987) ("The record establishes that plaintiff distinctly stated the grounds of her objection to the instruction on several occasions."); *Kakavas* v. *Flota Oceanica Brasileira, S.A.*, 789 F.2d 112, 120 (2d Cir.), *cert. denied*, 479 U.S. 853 (1986) (plaintiff's on the record request for a further charge, was sufficient to preserve the objection to the charge as given); *Powell* v. *Rockwell International Corp.* 788 F.2d 279, 285-286 (5th Cir. 1986) ("Because the record discloses that Rockwell made known its position to the judge that it was dissatisfied with the willfulness instruction, we find that it did not waive its right to pursue this claim at a later time."); *Bowley* v. *Stotler & Co.*, 751 F.2d 641, 647 (3d Cir. 1985) ("On this record it cannot seriously be contended that Bowley failed to preserve his objection to the incompleteness of the charge on control."); *United States* v. *Hollinger*, 553 F.2d 535, 543 (7th Cir. 1977) ("[S]pecific and distinct objections voiced in an earlier instruction conference held in the presence of a court reporter will be considered timely."); *Weir* v. *Federal Ins. Co.*, 811 F.2d 1387, 1391 (10th Cir. 1987).

In contrast to the cases cited by Petitioner, and as specifically found by the First Circuit, his counsel never made any record objection to the instruction he now assigns as error. 877 F.2d at 1109, Petition at A-5.[1] Thus, there was no basis for the

[1] Petitioner agrees that there is no record of his objection. *See* Petition at 11 n.3. Despite the fact that no record of his objection exists, however, Petitioner asserts, without a citation, that "[t]here is no question as to whether the court

First Circuit to review the objection to determine if the district court had been adequately apprised of the basis for the objection Petitioner allegedly made.

II. Petitioner Is Attempting to Raise a New Issue On Appeal.

Even if Petitioner's off the record telephone call were found to be sufficient under Rule 51 to preserve his objection to the supplementary instructions, this Court should deny his petition for writ of certiorari because he is now raising a new and different objection than the one he allegedly made by telephone. Petitioner asserts that the basis of the objection made by telephone was that the proper allocation of the burden of proof was as enunciated in *Fields* v. *Clark University*, 817 F.2d 931 (1st Cir. 1987). *See* Petition at 7 and 22. In *Fields* the First Circuit held that "[w]hen a plaintiff has proved by direct evidence that unlawful discrimination was a motivating factor in an employment decision, the burden is on the employer to prove by a preponderance of the evidence that the same decision would have been made absent the discrimination." 817 F.2d 831, 837 (1st Cir. 1987). Petitioner asserts that at trial he took the position that for him to prevail the alleged discrimination only had to be *a* motivating factor, as set out in *Fields*, rather than *the* motivating factor. (Petition at 7.) The court's supplementary charge tracked the language in the *Fields* case. (App. Vol. II at 224). Thus Smith received the instruction that he asked for, an instruction that was a correct statement of the law.

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fully understood the objection." Petition at 11. Finding such a citation would indeed be impossible, since without a record there is no way for an appellate court to determine whether the district court accurately understood and responded to the objection.

Since, subsequent to Petitioner's telephone "objection", the court gave an instruction that included the burden of proof language that Petitioner alleges he requested, Petitioner cannot, and no longer is, complaining that the jury instructions misstated the burden of proof. Instead, he now objects to the jury instructions as a whole on the ground that they were too confusing. *See* Petition at 23. This is a distinct objection that was not raised in any form at trial.[2] Therefore, under Rule 51, it cannot be raised for the first time in this petition for certiorari. *See McClow* v. *Warrior & Gulf Navigation Co.*, 842 F.2d 1250 (11th Cir. 1988) (objection regarding burden of proof cannot be raised upon appeal where only objection at trial was that instructions were in error as they related to issue of causation); *Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, 738 F.2d 1509, 1513-15 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985) (objection that instructions misstated relevant law cannot be raised upon appeal where only objection at trial was that issue should be decided by the court as a matter of law); *Solomon Dehydrating Co.* v. *Guyton*, 294 F.2d 439, 444-45 (8th Cir.) (Blackmun, J.), *cert. denied*, 368 U.S. 929 (1961) (objections of vagueness, indefiniteness, and confusion cannot be raised upon appeal where only objection at trial was that instructions misstated the law); *Hargrave* v. *Wellman*, 276 F.2d 948, 950 (9th Cir. 1960) (objection of no factual warrant for instruction cannot be raised upon appeal where only objection at trial was that instructions misstated the law). Since Petitioner failed at trial to object to the instruction as confusing, he may not raise that objection for the first time on appeal.

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[2] Nor could it have been, since counsel was not present at the time the supplementary instruction was given.

III. The Objection Raised by Petitioner For the First Time on Appeal Does Not Rise to the Level of Plain Error.

Petitioner asserts that the First Circuit should have reviewed the supplemental instructions even though he made no objection to them because the error he assigned to them constitutes "plain error." Although Rule 51 does not contain an explicit plain error exception to the requirement of a timely objection to jury instructions,[3] the First Circuit will review jury instructions even in the absence of strict compliance with Rule 51 in order "to prevent a clear miscarriage of justice" in "the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803, 809 (1st Cir.), *cert. denied*, U.S. , 109 S.Ct. 392, 102 L.Ed.2d 381 (1988) (quoting *Nimrod* v. *Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966), *Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976), and C. Wright & A. Miller, Federal Practice and Procedure § 2558 at 675 (1971)). The First Circuit's formulation of the plain error rule is consistent with the rule articulated in the other circuits that have adopted the plain error exception. *See*, *e.g.*, *Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, 738 F.2d 1509, 1513-15 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Wright* v. *Farmers Co-Op of Arkansas & Oklahoma*, 620 F.2d 694, 699 (8th Cir. 1980); *Cohen* v. *Franchard Corp.*, 478 F.2d 115, 125 (2d Cir.), *cert. denied*, 414 U.S. 857 (1973).

A party seeking appellate review of jury instructions for which no objection was made, bears a "heavy burden of demon-

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[3] Compare Rule 51 Fed. R. Civ. P. with Rule 52(b) Fed. R. Crim. P. which states "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

strating plain error." *Clegg* v. *Conk*, 507 F.2d 1351, 1362 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975). The plain error exception is limited to those rare cases where the error undermines constitutional guarantees, *Hunt* v. *Liberty Lobby*, 720 F.2d 631, 647 (11th Cir. 1983) (jury instructions contained wrong standard for proof of libel of a public figure); or where the instruction was an incorrect statement of the law and clearly resulted in an incorrect verdict, *Rodrigue* v. *Dixilyn Corp.*, 620 F.2d 537, 541 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); or where the instructions provided the jury with no guidance and allowed them to reach a verdict through speculation or conjecture. *Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, *supra* at 1517; *Morris* v. *Getscher*, 708 F.2d 1306, 1309-10 (8th Cir. 1983); *Cruthirds* v. *RCI, Inc.*, 624 F.2d 632, 636 (5th Cir. 1980).

In this case, Petitioner provides no support for his claim that this is an exceptional case warranting review under the plain error standard. He simply asserts that the charge, though accurately stating the law, was confusing. *See* Petition at 23. There is no evidence in this case that the instruction was confusing or that the jury was in fact confused. The instructions read as a whole accurately guided the jury in the method of proof in a discrimination case. Nor is there any evidence that the verdict was a miscarriage of justice. There was substantial evidence in this case, that Petitioner was a difficult, abrasive, nonproductive employee whose termination was not in any way related to his age. (*See*, *e.g.*, Transcript at 7-76, 7-78, 7-84, 12-22, 12-25, 12-26, 12-41, 12-42, 12-71, 12-72, 12-78, 12-79, 12-82, 12-89,). The First Circuit was correct in its judgment that there was no plain error in this case.

IV. There Is No Reason For Any Court to Revisit This Case For Consideration of *Price Waterhouse* v. *Hopkins*.

This Court should not grant Petitioner's request for certiorari, nor should it remand this case, simply because the First Circuit did not cite *Price Waterhouse* v. *Hopkins*, 490 U.S. , 109 S.Ct. 1775, 104 L.Ed.2d 268 (May 1, 1989) in its decision. *Price Waterhouse* was decided on May 1, 1989, the same day that the parties argued Petitioner's appeal before the First Circuit. As Petitioner points out (Petition at 10), both parties informed the First Circuit of the *Price Waterhouse* decision shortly thereafter. Seven weeks later, on June 22, 1989, the First Circuit affirmed the trial court's judgment. Its decision does not cite *Price Waterhouse*, a fact Petitioner equates with a failure to consider the case at all. Petitioner offers nothing else as evidence that the court failed to consider *Price Waterhouse*. Both parties agree, however, that the First Circuit was aware of the *Price Waterhouse* decision and that it was relevant to the correctness of the court's jury instructions in as much as it addressed the relative burdens of proof in a discrimination case.[4] There is, therefore, no reason to assume that Petitioner's appeal was not decided "under the hovering presence" of *Price Waterhouse*. *See Pauling* v. *Globe-Democrat Publishing Co.*, 362 F.2d 188, 198-99 (8th Cir. 1966) (Blackmun, J.), *cert. denied*, 388 U.S. 909 (1967). The First Circuit indicated that it had reviewed the jury instructions as a whole and as a result of that review was "not sure that the

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[4] *Price Waterhouse* adopted the standard of proof set out by the First Circuit in *Fields* v. *Clark University*, 817 F.2d 931, 936-937 (1st Cir. 1987), 490 U.S. , , 109 S.Ct. 1775, 1795, 104 L.Ed.2d (1989). Since the jury was instructed in accordance with *Fields* v. *Clark University*, the application of *Price Waterhouse* to these jury instructions would have resulted in a finding that the instructions were correct as a matter of law.

instruction was error at all."[5], 877 F.2d at 1110, Petition at A-7. Since the First Circuit reviewed the entire instruction after being made aware of the *Price Waterhouse* decision, there is simply no basis for Petitioner's claim that the First Circuit failed to consider it.

Conclusion.

The Petition for Certiorari should be denied.

Respectfully submitted,

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[5] The only possible relevance of *Price Waterhouse* to the First Circuit's decision in this case is in connection with its finding that the jury instructions did not constitute plain error. Having found against Petitioner on the Fed. R. Civ. P. 51 issues, the First Circuit had no further need to consider *Price Waterhouse*.